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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 225

THE MIAMI HERALD PUBLISHING COMPANY, PETITIONER

v.

HAROLD A. BOIRE, REGIONAL DIRECTOR, 12TH REGION, NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–14a) is reported at 343 F. 2d 17. The findings, conclusions and order of the district court (Pet. 25a–30a) are unreported. The decisions of the Board in the underlying representation case (R. 14–17, 23–24, 30–33, 34–35)[1] are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. 15a) was entered on March 11, 1965. A petition for re-

[1] "R." refers to the printed record prepared for the court below and filed with the petition.

hearing was denied on April 28, 1965 (Pet. 24a). The petition for a writ of certiorari was filed on June 7, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when an employer invokes the jurisdiction of a federal district court to set aside a representation election under the National Labor Relations Act on the claim that in conducting the election the National Labor Relations Board violated a specific statutory provision, the court must decide the statutory question in order to determine whether to entertain the suit; or whether it should dismiss the suit unless it is clear that the Board has violated the Act as alleged.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 31a–32a of the petition.

STATEMENT

1. BACKGROUND

On June 29, 1962, the respondent Regional Director, pursuant to a petition filed by the Union,[2] directed that a representation election be held among the Company's pressroom employees (R. 14–17). The Union had been engaged in an economic strike against the Company since August 1, 1961 (R. 15, n. 3). In accordance with Section 9(c)(3) of the Act (p. 10, *infra*), the

[2] Miami Newspaper Printing Pressmen's Union, Local 46.

Direction of Election specified that the employees eligible to vote would include "employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements" (R. 16). The Regional Director denied the Company's motion to dismiss the petition for an election because the Board had not promulgated rules and regulations governing the voting eligibility of economic strikers, on the ground that (R. 15, n. 4):

> * * * Section 9(c)(3) of the Act allows replaced economic strikers to vote in any election within 12 months after the commencement of the strike, and this qualification is not lost because of the Board's policy (*W. Wilton Wood, Inc.*, 127 NLRB 1675) of deciding the voting eligibility of strikers by the adjudicative process rather than by general rules and regulations. *Tampa Sand and Material Co.*, 129 NLRB 1273, 1274, 1275. * * *

A single member of the Board denied the Company's request for review of the Regional Director's decision (R. 6).

The Company then instituted an action in the United States District Court for the Southern (now Middle) District of Florida, Tampa Division, to enjoin the Regional Director from conducting the election. The Company alleged that the Direction of Election was invalid because economic strikers were to be allowed to vote without the Board having promulgated regulations governing their eligibility (R.

41).[3] The district court permitted the election to proceed as scheduled, but ordered the ballots impounded pending final determination of the proceeding before it (R. 41–42, 17–18).

Prior to further hearing in the district court, the Board (four members participating) set aside the election, which had been held on July 25, 1962, and granted the Company's request for review of the Regional Director's Direction (R. 42, 23–24).[4] On motion of the Regional Director, the district court then dismissed the Company's suit without prejudice, ruling that the Board's action in setting aside the July 25 election had rendered the cause moot. *Miami Herald Publishing Co.* v. *Boire,* 209 F. Supp. 561 (S.D. Fla.) (R. 42, 24–30).

On November 8, 1962, the full Board affirmed the Regional Director's conclusion that Section 9(c)(3) permitted the Board to delineate the voting eligibility of strikers on a case-by-case basis, and did not require it to use formal rule-making procedures. The Board did not reinstate the July 25 election, however, but

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[3] The Company also alleged that the scheduled election was invalid because the denial of its request for review of the Regional Director's decision had been the action of only one member of the Board, contrary to Section 3(b) of the Act which authorizes the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise" (R. 25).

[4] The Board set aside the July 25 election because of its doubt whether a single member had authority to rule upon the Company's request for review. See *Miami Newspaper Printing Pressmen's Union Local 46* v. *McCulloch,* 322 F. 2d 993, 996 (C.A. D.C.), discussed at p. 5, n. 5, *infra.*

ordered the Regional Director to conduct a new election (R. 30–33).

The Union then instituted a suit in the United States District Court for the District of Columbia to enjoin the Board from conducting the new election and to compel it to certify the results of the July 25 election (R. 43). The district court declined to grant such relief, but the Court of Appeals for the District of Columbia Circuit reversed. *Miami Newspaper Printing Pressmen's Union Local 46* v. *McCulloch*, 322 F. 2d 993.[5]

2. THE PRESENT SUIT

The Regional Director, in conformity with the decision in *Miami Newspaper Printing Pressmen's Union, supra,* advised the Company that he intended to count the ballots cast in the July 25 election (R. 34–35). The Company thereupon instituted the present suit to enjoin that action (R. 1–13). The complaint alleged that the July 25, 1962, election violated the Act, because the Board had permitted economic strik-

[5] The court of appeals held that, even if the Board's single-member review procedure violated Section 3(b) (see p. 4, n. 3, *supra*), the subsequent action of four members of the Board in passing on the Company's request for review remedied any prior procedural infirmity. In these circumstances, the court concluded, the Board had no valid reason for setting aside the July 25 election, and hence Section 9(c)(1) of the Act—which provides that, if the Board finds that a question of representation exists, "it shall direct an election by secret ballot and shall certify the results thereof"—required the Board to certify the results of that election. Having found that the Board thus had violated a specific mandate of the statute, the court further concluded that the district court had jurisdiction to grant the relief sought under the *Kyne* test (see pp. 7, 12, *infra*).

ers to vote without having promulgated, pursuant to the Administrative Procedure Act, regulations governing their voting eligibility (R. 9–10). The Regional Director moved to dismiss the complaint, or in the alternative for summary judgment, on the grounds that: (1) the district court lacked jurisdiction over the subject matter of the action; (2) the action was premature; and (3) the complaint failed to state a claim on which relief could be granted (R. 37–38).

The district court, after hearing, held that it had jurisdiction of the suit, and granted a preliminary injunction against the counting of the ballots pending its determination whether Section 9(c)(3) requires the Board to promulgate regulations governing voting by economic strikers in representation elections (R. 44–46). The court of appeals reversed and remanded the case to the district court with directions to dismiss the complaint (Pet. 1a–14a).* The court, analyzing the merits of the company's complaint "only for the limited purpose of determining whether there has been such a plain contravention of a statutory mandate that the district court properly enjoined the counting of the ballots" (Pet. 13a), concluded (*id.*, 12a–13a):

> In view of the persuasive arguments which have been advanced on both sides of the question and the ambiguity of the legislative history, we cannot say the Board's violation of the statute, if any, is so manifest that it warrants

* However, when the Company indicated its intention to seek certiorari, the court of appeals continued the injunction against the counting of the ballots until the proceedings in this Court were completed.

the invocation of the equity powers of a district court prior to the issuance of a cease-and-desist order based upon the union's certification.

ARGUMENT

In *Leedom* v. *Kyne*, 358 U.S. 184, 188, this Court held that, where a Board decision in a representative proceeding is "made in excess of its delegated powers and contrary to a specific prohibition in the Act," a district court has jurisdiction over an action to vacate such decision brought by a person aggrieved thereby.[7] The question in the present case is whether, when such an action is filed alleging that the Board has violated a specific statutory provision, the district court is required to adjudicate the underlying statutory issue in order to determine whether it has jurisdiction; or whether, as the court of appeals held, the district court should dismiss the suit unless the Board's action constitutes "a plain contradiction of a statutory mandate" or a "manifest" statutory violation (Pet. 12a–13a). Although this Court has not decided that question,[8] we submit that the court of appeals answered it correctly, and there is no occasion for future review.

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[7] In *Kyne*, the Board action was found to contravene Section 9(b)(1) of the Act, which provides that "the Board shall not * * * decide that any unit is appropriate for ["bargaining"] purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit."

[8] A violation of the Act was alleged in *Boire* v. *Greyhound Corp.*, 376 U.S. 473, but the issue there was essentially factual and did not depend solely upon construction of the statute (p. 481).

1. Board decisions in representation proceedings ordinarily cannot be reviewed directly, but only in connection with review of final Board orders entered in unfair labor practice proceedings. In other words, an employer who wishes to contest a Board determination in a representation proceeding must await the outcome of the election, and then refuse to bargain with the union if it is certified. If the Board then holds that such refusal to bargain was an unfair labor practice and orders the company to bargain, Section 9(d) of the Act allows the employer to obtain "judicial review of the underlying certification order" (*Boire* v. *Greyhound Corp.*, 376 U.S. 473, 477) in the court of appeals as an incident to review of the Board's final order. Thus, if in the present case the Union should be certified as a result of the July 25, 1962, election and the Company should then refuse to bargain with the Union, the Company, in connection with a proceeding in the court of appeals to enforce or set aside any Board order directing it to bargain with the Union, could obtain full review of its contention that the Act requires the Board to promulgate regulations governing the voting rights of economic strikers. The present case is unlike *Kyne* in that there the union, the aggrieved party, could not realistically obtain adequate review by following the foregoing statutory procedure. See *Leedom* v. *Kyne*, 249 F. 2d 490, 492 (C.A.D.C.).

This Court has thrice noted the limited nature of its *Kyne* decision. *McCulloch* v. *Sociedad*, 372 U.S. 10, 17; *Boire* v. *Greyhound Corp.*, 376 U.S. 473; *Brotherhood of Railway Clerks* v. *Association of Non-*

Contract Employees, 380 U.S. 650. In view of the substantial delay that would result from direct review of Board action in representation proceedings, and the fact that an employer can fully litigate the statutory questions by following the normal route of challenging final Board orders, the courts of appeals consistently have held since *Kyne* that the district courts have no jurisdiction to entertain suits in which representation determinations are challenged because of the Board's alleged violation of a specific statutory provision, unless it is beyond dispute that the Board has so erred.[9] As the Second Circuit explained in *Empress Hondurena de Vapores* v. *McLeod,* 300 F. 2d 222, 229, n. 6, vacated and remanded, 372 U.S. 10, 22, "the point of the 'plain contravention' requirement is to close the doors of the courts at the very outset to actions for injunctions in representation matters, which, though ultimately found unmeritorious, would have accomplished much of their objective by the very time required for judicial consideration." See also *Local 1545, United Brotherhood of Carpenters* v. *Vincent,* 286 F. 2d 127, 132–133 (C.A. 2).[10]

In the present case the Board cannot be said to have

[9] *Int'l Ass'n of Tool Craftsmen* v. *Leedom,* 276 F. 2d 514 (C.A.D.C.), certiorari denied, 364 U.S. 815; *Leedom* v. *Int'l Brotherhood of Electrical Workers,* 278 F. 2d 237, 244 (C.A. D.C.); *Lawrence Typographical Union* v. *McCulloch,* 59 LRRM 2161 (C.A.D.C.), May 6, 1965; *Local 1545, United Brotherhood of Carpenters* v. *Vincent,* 286 F. 2d 127, 132–133 (C.A. 2).

[10] The distinction between a "clear error of law" and one that is not so clear is criticized in Cox, *The Major Labor Decisions of the Supreme Court October Term 1958,* reprinted in Gellhorn & Byse, *Administrative Law* (4th ed. 1960) 441, 444, *ff.*

committed a "clear" violation of the statute. Section 9(c)(3) provides that economic strikers who are not entitled to reinstatement "shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike." The term "regulations" as used in this provision does not necessarily refer to formal rules promulgated in accordance with the Administrative Procedure Act. The legislative history of this section does not show any intent to impose such a requirement;[11] where Congress wished to refer to rule-making under the Administrative Procedure Act, it specifically did so.[12]

Nor would requiring the Board to employ formal rule-making procedures effectuate the purposes of Section 9(c)(3). For the problem presented by that section is to apply a recognized principle—that a striker may retain a sufficient interest in his former job to be entitled to have a voice in selecting a representative (see *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1359–1360)—to a wide variety of factual situations. Such problems are best handled on a case-by-case basis as they arise, instead of issuing at the outset a broad general regulation which cannot adequately take into account all the variations which may develop.

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[11] See the discussion in the court of appeals' opinion, Pet. 11a–12a. See also 105 Cong. Rec. 6533, II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O., 1959) 1138.

[12] Compare Section 14(c)(1), which provides that the Board,

In sum, Congress did not use the word "regulations" in Section 9(c)(3) as a term of art, but rather in the colloquial sense of directing the Board to promulgate the governing principles in whatever form it deemed most appropriate, *i.e.*, either through rule-making or on a case-by-case basis.[12]

Thus, the statutory question (from the Board's point of view) is, at worst, debatable, and, in fact, there is a substantial basis for concluding that the Board's interpretation is correct. We know of only one other litigated case in which the question has been raised, and the court of appeals there upheld the Board's position. *Kingsport Press, Inc.* v. *McCulloch*, 336 F. 2d 753 (C.A.D.C.), certiorari denied, 379 U.S. 931. Unlike the situation in *Leedom* v. *Kyne*, therefore, here the Board cannot be charged with having committed "clear" or "plain" statutory error, *i.e.*, to have acted "in excess of its delegated powers and contrary to a specific prohibition in the Act." In the circumstances, the court of appeals correctly ruled (Pet. 12a–13a) that there had not been "such a plain contravention of a statutory mandate" as to warrant "the invocation of the equity powers of a district court prior to the issuance of a cease-and-desist order based upon the union's certification."

"in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act," decline to assert jurisdiction in certain cases.

[12] Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201–203; *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 371; *Optical Workers' Union Local 24859* v. *National Labor Relations Board*, 227 F. 2d 687 (C.A. 5), certiorari denied, 351 U.S. 963.

2. There is no conflict between the decision below and *Miami Printing Pressmen's Union Local 46* v. *McCulloch*, 322 F. 2d 993 (C.A.D.C.) (Pet. 14). As noted above (p. 5, n. 5), the underlying question there was not whether the Board violated Section 9(c)(3) in directing the July 25 election, but whether Section 9(c)(1) required the Board to certify the results of the election it had conducted and thus barred a second election. The court held that the Board in failing to certify had violated the specific command of Section 9(c)(1). When the District of Columbia Circuit subsequently considered the issue involved here—*i.e.*, whether the claim that the Board violated Section 9(c)(3) in directing an election without first issuing formal rules delineating the voting rights of economic strikers was sufficient to give the district court jurisdiction to review a representation election—it reached the same negative conclusion as the court below. *Kingsport Press, Inc.* v. *McCulloch*, 336 F. 2d 753 (C.A.D.C.), certiorari denied, 379 U.S. 931.

Nor is the result here inconsistent with *Brotherhood of Railway Clerks* v. *Association of Non-Contract Employees*, 380 U.S. 650, as petitioner claims (Pet. 13). The question in that case was whether the district court had jurisdiction to entertain a suit to enjoin the National Mediation Board from conducting a representation election, on the basis of claims that (1) the Board proposed to use a form of ballot which the Act did not sanction (2) the Board had improperly refused to reopen its prior determination of the ap-

propriate unit, and (3) the Board had erroneously denied intervention to the carrier involved. Although the Court, prior to holding that the district court had no jurisdiction, did decide that the Board had not acted beyond its statutory authority in making those rulings, there are significant distinctions between the review procedures under the Railway Labor Act and under the National Labor Relations Act which distinguish the cases.

As we have noted, rulings of the National Labor Relations Board in representation proceedings may be fully challenged in connection with review of final Board orders in unfair labor practice proceedings which direct the employer to bargain with the certified union. Under the Railway Labor Act, however, the National Mediation Board enters no orders directing carriers to bargain, but merely certifies the representative for collective bargaining that the employees have selected. It is the statute, and not any order of the Mediation Board, which obligates the carrier to bargain. To be sure, if the carrier refuses to bargain with the certified union, the latter may maintain an action in the district court to compel the carrier to do so (*Virginia Railway Co.* v. *System Federation No. 40,* 300 U.S. 515). But the extent to which the carrier may litigate in such suit questions as to the validity of the Mediation Board certification proceedings is uncertain; and it thus may be that, if the court does not pass upon the merits of such ruling when it is directly challenged, there will be no further opportunity for judicial review thereof.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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